not in fact been made. Insistence to the extent necessary to accomplish that result, upon the literal meaning of the words, is surely unsound once the validity of estates *in futuro* is freely acknowledged. For they are then capable of another construction, consistent with, instead of squarely opposed to, the other evidence of the grantor's intent. Clearly the true intent, however inaptly expressed, was merely to postpone the vesting of the estate given. Many additional arguments support this view. It may well be urged that the grantor must have intended to accomplish something, and must in fact have known that without witnesses the instrument could not operate as a will.[11] Then it is well recognized that "it is the duty of a court to seek by construction to maintain rather than to defeat the deed." [12] In short, to construe a clause, the intended meaning of which is scarcely even doubtful, so as to invalidate the entire document and thwart the other clearly expressed intentions of the maker is as undesirable as it is unnecessary. It offers an example worthy of three centuries ago of the technicality and injustice of which the law is sometimes capable. It can only be explained as the result of an extraordinary harking back to a feudal notion of the invalidity of estates *in futuro* which the courts that interpreted the Statute of Uses definitely repudiated.

As to the state of the authorities, it is to be noted that the majority of the cases are of the intermediate class already alluded to.[13] These in so far as they hold the deed valid and irrevocable are in accord with the position contended for. In so far, however, as they shun the possibility of an estate *in futuro*, and rely upon an implied reservation of a life estate, they are, it is submitted, unsound. The law is strongly opposed, always, to the implication of life estates.[14] The language used would seem to negative any intention that the grantee should acquire an estate in the land during the grantor's life. And as we have seen, it is unnecessary to resort to any such implication.[15]

FRANCHISE TAXES ON CORPORATIONS INCORPORATED IN MORE THAN ONE STATE. — A recent case in the United States Supreme Court raises the question of the effect of incorporation of the same body under the laws of several states upon the taxing power of each of the incorporating states under the due process clause of the Constitution. *Kansas City, M. & B. R. Co.* v. *Stiles*, 37 Sup. Ct. Rep. 58.[1] It is not due process to

[11] That is the argument of the court in McLain *v.* Garrison, 39 Tex. Civ. App. 431, 88 S. W. 484.

[12] Trafton *v.* Hawes, 102 Mass. 533.

[13] See note 4, *supra*.

[14] See KALES, FUTURE INTERESTS IN ILLINOIS, § 158 *b*.

[15] Moreover, in a large proportion of these cases the only point in issue was the validity of the deed. Suit had not been brought until after the death of A., when under either view B. held in fee. The discussion of what A. had retained before his death was therefore mere *dictum*.

The case of *In re* Bybee, just reported in 160 N. W. 900 (Iowa), is interesting as possibly showing a tendency to stretch a point in upholding as a will an instrument of the sort here considered, which the same court had previously held invalid as a deed. See Ransom *v.* Pottawattamie County, 168 Iowa 570, 150 N. W. 657, cited in note 2, *supra*.

[1] For a fuller statement of the facts, see RECENT CASES, p. 527.

tax property having a permanent *situs* outside of the territorial jurisdiction of the taxing state.[2]

In the first place, it is to be remembered that there is a vital, if elusive, difference between corporate franchise taxes[3] and taxes on corporate property. The former may be levied arbitrarily by a state as excise taxes in return for the right to have corporate existence or to do business in that state;[4] by hypothesis they are not taxes on property outside of the state.[5] The latter, as the name implies, are taxes upon property and must respect the *situs* of that property. This difference being one of substance, the courts go behind the legislative form and name of a tax law in every case. Of course, if the legislature has called it a property tax, the problem is comparatively easy:[6] to decide on what property the tax shall fall. But if the legislature has called it a franchise tax, the court is confronted with the difficult problem of deciding whether the legislature has not, after all, levied a property tax.[7] This problem comes before the Supreme Court in every case, for, as in cases arising under the contracts clause,[8] the state court's construction of the state law is not accepted,[9] but is reviewed under the rule that "every case involving the validity of a tax must be decided on its own facts; and if the tax purports to be laid upon a subject within the taxing power of the states, it is not to be condemned by the application of any artificial rule but only when the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."[10] The decided cases do not clearly show what facts will support the burden of proving that the necessary effect of what the state court has called a franchise tax is to lay a tax on property

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[2] Union Transit Co. *v.* Kentucky, 199 U. S. 194.

[3] Throughout this note by "franchise tax" is meant an excise levied by a state upon a privilege to exist as a corporation of the state or a privilege given a foreign corporation to do business in the state, regardless of the value of the privilege. Franchises are often taxed as valuable property, but "franchise tax" is not used here to designate such a tax. See North Jersey St. Ry. Co. *v.* Jersey City, 73 N. J. L. 481, 483, 63 Atl. 833, affirmed in 74 N. J. L. 761, 67 Atl. 33; Phillipsburg R. Co. *v.* Assessors, 82 N. J. L. 49, 81 Atl. 1121.

[4] See COOLEY, TAXATION, 3 ed., 153, 154.

[5] See Home Ins. Co. *v.* New York, 134 U. S. 594, 601. "From the very nature of the tax being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital is invested."

[6] Fargo *v.* Hart, 193 U. S. 490; Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341.

[7] Some of the confusion no doubt arises from the double meaning given to "franchise tax." See Louisville, etc. Ferry Co. *v.* Kentucky, 188 U. S. 385, in which a "franchise tax" was held invalid since "it was not competent for Kentucky . . . to tax the franchise which its corporation lawfully acquired from Indiana and which franchise or incorporeal hereditament had its *situs* for purposes of taxation in Indiana."

[8] McCullough *v.* Virginia, 172 U. S. 102.

[9] This rule has not been reached without vigorous opposition. In Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 228, Mr. Justice Harlan, in a dissenting opinion in which the Chief Justice, Mr. Justice White, and Mr. Justice McKenna concurred, said: "In my opinion the court ought to accept the interpretation which the Supreme Court of Texas places upon the statute in question. In other words, it should be assumed that . . . the State intended to impose only an occupation tax."

[10] See Kansas City Ry. Co. *v.* Kansas, 240 U. S. 227, 233. The same idea that a valid tax may be measured as the legislature sees fit was used to support a federal excise tax on corporations measured by income in Flint *v.* Stone Tracy Co., 220 U. S. 107.

outside of the state.[11] They vaguely indicate, however, that the measure of a tax should have some relation to the subject of the tax and that it is dangerous to base a franchise tax upon a valuation of property, without adding some clause, such as a maximum imposition or a pro-rating of assets to business in the state, to negative any inference that a tax based on property values must be a tax on property.[12] The Alabama franchise tax attacked in *Kansas City, M. & B. R. Co.* v. *Stiles*[13] did not approach this danger limit; it levied a tax on domestic corporations based upon paid-up capital stock, regardless of values.[14]

It was argued, however, that the railroad, being incorporated in other states, was not a domestic corporation in Alabama. The argument is hard to support. At least for purposes of jurisdiction, a corporation incorporated in several states is domestic in each of them.[15] The few cases which have said that the federal courts must consider it a corporation only of the state originally creating it[16] have been explained by the fact that in those cases the incorporation in other states was required as a condition precedent to doing business therein and in substance was not incorporation.[17] Furthermore, in garnishment proceedings against a railroad incorporated in three states, a motion to dismiss the suit for want of jurisdiction was overruled, the court saying that the debt subject to garnishment had a *situs* wherever the corporation had its domicil, which was in any one or all of the three states.[18] It has been held that a statute levying a tax on domestic corporations included those incorporated in other than the taxing state.[19] Succession taxes of any one of the incor-

[11] Most of the cases go off on the point that state taxation puts a burden on interstate commerce; the question of due process is seldom raised. For a review of the decisions on state taxes affecting interstate commerce, see Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, and note in 28 HARV. L. REV. 93.

[12] See Society for Savings *v.* Coite, 6 Wall. (U. S.) 594, affirming 32 Conn. 173 (tax on total deposits partly invested in federal securities); The Delaware Railroad Tax, 18 Wall. (U. S.) 206 (tax based on an unequal pro-rating of capital stock); Home Ins. Co. *v.* New York, 134 U. S. 594 (tax based on dividend partly derived from federal securities); Ashley *v.* Ryan, 153 U. S. 436 (tax based on total capitalization); Galveston, etc. Ry. Co. *v.* Texas, 210 U. S. 217 (tax based on gross receipts); Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, affirming 207 Mass. 381, 93 N. E. 831 (tax based on total authorized capital, with a maximum of $2000); Kansas City Ry. Co. *v.* Kansas, 240 U. S. 227, affirming 95 Kan. 261 (same); Crane Co. *v.* Looney, 218 Fed. 260 (tax based on capital, surplus, and undivided profits).

[13] *Ubi supra.*

[14] GENERAL ACTS OF ALABAMA, 1911, 170.

[15] Memphis & C. R. Co. *v.* Alabama, 107 U. S. 581; Patch *v.* Wabash R. Co., 207 U. S. 277. In the latter case the court, at p. 283, said: "Therefore the question is raised how a corporation . . . thus organized shall be regarded for purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. . . . It cannot escape the jurisdiction by the fact that it is incorporated elsewhere." Goodwin *v.* New York, N. H. & H. R. Co., 124 Fed. 358; Goodwin *v.* Boston & Maine R. Co., 127 Fed. 986; Wasley *v.* Chicago, R. I. & P. Ry. Co., 147 Fed. 608; Case *v.* Atlanta & C. A. L. Ry. Co., 225 Fed. 862. See 19 HARV. L. REV. 134.

[16] Nashua & L. R. Co. *v.* Boston & L. R. Co., 136 U. S. 356; St. Louis & S. F. Ry. Co. *v.* James, 161 U. S. 545; Southern Ry. *v.* Allison, 190 U. S. 326.

[17] See Goodwin *v.* New York, N. H. & H. R. Co., 124 Fed. 358, 359. The opinion of Lowell, J., in this case gives a complete review of the authorities.

[18] Johnson *v.* Union Pac. Ry. Co., 145 Fed. 249.

[19] Quincy Bridge Co. *v.* Adams County, 88 Ill. 615. Breese, J., said, at p. 619: "the

porating states apply to the stock of the corporation incorporated in several states.[20]

In seeking incorporation in more than one state, therefore, a corporation seeks to become a domestic corporation in each state. The privileges and advantages which it gains thereby in each state are neither greater nor less than the corporate privileges of every corporation of that state. And so it is only reasonable to conclude that a tax on those privileges may be based on any measure that is valid as to domestic corporations not organized elsewhere. This conclusion was reached in the principal case and in the only authority previous to it on the same point.[21] There is a single *dictum* to the contrary.[22]

RECENT CASES

ATTACHMENT — SAVINGS ACCOUNT — SUBSEQUENT DIVIDENDS. — Pending the termination of his suit against members of a trade union, the plaintiff attached their savings accounts in the defendant bank. Later the depositors assigned the dividends subsequently accruing upon the deposits. Both the assignees and the plaintiff, who has secured judgment against the depositors, claim the dividends. *Held*, that the attachment lien covered the dividends. *Savings Bank of Danbury* v. *Loewe*, U. S. Sup. Ct., Oct. Term, 1916, No. 713.

An attachment only reaches effects of the debtor in the hands of the garnishee at the time of service upon the latter. Thus, wages or salary not earned or due at the time of the service of the process cannot be reached. *Coburn* v. *Hartford*, 38 Conn. 290; *Taber* v. *Nye*, 12 Pick. (Mass.) 105. See 12 HARV. L. REV. 141. But whatever binds the principal should bind that which is incident to the principal. Accordingly, an attaching creditor may recover the interest upon a

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corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of this State. . . . As argued by the appellee, the only possible status of a company acting under charters from two States is that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States it acts under the authority of the charter of the State in which it is then acting . . ." Easton Bridge *v.* Metz, 32 N. J. L. 199. See Keokuk & H. Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691.

[20] Moody *v.* Shaw, 173 Mass. 375, 53 N. E. 891; Attorney General *v.* New York, N. H. & H. R. Co., 198 Mass. 413, 84 N. E. 737; Cooley's Estate, 186 N. Y. 220, 78 N. E. 939. See Richardson *v.* Vermont & Mass. R. Co., 44 Vt. 613, 623.

[21] Lumberville Bridge Co. *v.* Assessors, 55 N. J. L. 529, 26 Atl. 711. The tax law said: "All . . . corporations incorporated under the laws of this State . . . shall pay a yearly license fee or tax of one tenth of one percent on the amount of capital stock of such corporations." At page 537, Garrison, J., said: "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, whereas the franchise with which we have to do is the right to exist in corporate form without reference to the powers that under such form the company may exercise. . . . The power, as in the case of the right to own and operate a railroad, is taxed as property having a true value. . . . On the other hand, the naked right of existing as a corporation is taxed . . . , not at its true value, . . . but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion."

[22] In State Treasurer *v.* Auditor General, 46 Mich. 224, 9 N. W. 258, the court held that a corporation incorporated in several states did not come within the terms of a certain tax, *because* to bring it within the terms would be to tax its property outside the jurisdiction. But this *dictum* is weakened by the fact that the court does not clearly hold that it was dealing with a franchise tax.